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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Amendment of Part 90 of the Commission's) PR Docket No. 93-144
Rules to Facilitate Future Development of) RM-8117, RM-8030,
SMR Systems in the 800 MHz Frequency Band) RM-8029

and

Implementation of Section 309(j) of the)
Communications Act -- Competitive Bidding) PP Docket No. 93-253
800 MHz SMR)

To: The Commission

COMMENTS

Triangle Communications, Inc. (Triangle), by its attorneys, hereby submits its Comments in the above-captioned matter. Triangle opposes the adoption of the proposals contained within the FNPRM. Insofar as Triangle's Reply Comments to the matter from which this FNPRM was derived are relevant, those Reply Comments are hereby incorporated herein, see, attached.

Triangle would like to voice its opposition to the Commission plan to divide the country along Metropolitan Trading Area lines and auction 200 of the currently-allotted SMR frequencies to the winning bidder. It is Triangle's belief that such a

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plan is impractical and unworkable, and if attempted, would injure the already established SMR industry.

Respectfully submitted,
TRIANGLE COMMUNICATIONS, INC.

By 
Kathleen A. Karcher

Brown and Schwaninger
Suite 650
1835 K Street, N.W.
Washington, D.C. 20006
202/223-8837

Dated: January 5, 1995

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Implementation of Sections 3(n) and 332) GN Docket No. 93-252
of the Communications Act)
)
Regulatory Treatment of Mobile Services)

To: The Commission

REPLY COMMENTS

Triangle Communications, Inc. (Triangle) hereby submits reply comments in the above captioned rule making. Triangle operates several SMR facilities in Eastern Pennsylvania, serving numerous end users. Its operation of SMR facilities has successfully continued for many years and represents one of the oldest SMR operations on the East Coast. Accordingly, Triangle is intensely interested in the outcome of this rule making proceeding and is highly qualified to make informed, meaningful comment.

The focus of Triangle's position is those comments filed by Nextel Communications, Inc. (Nextel), wherein Nextel has proposed that it and other similarly situated ESMR operators be provided with authority to gain exclusive control of up to 200 SMR channels within Metropolitan Trading Areas (MTA),¹

¹ Triangle assumes that the logical extension of Nextel's plan would involve frequency consolidation and exchange within Basic Trading Areas also. Accordingly, Nextel's proposal, if enacted, would result in a nationwide reallocation of spectrum to accommodate the operation of ESMR facilities.

including the authority to exchange certain frequencies with existing analog SMR operators to accomplish the proposed task.

Triangle hereby respectfully states its opposition to Nextel's proposals and requests that the Commission dismiss and deny any such proposal. In support of its position, Triangle states the following.

Nextel's Position Is Without Legal Foundation

Nextel stated that it is entitled to consideration of its proposal arising out of the Commission's obligation created under the Communications Act of 1934, as amended, including such amendments arising out of passage into law of the Omnibus Budget Reconciliation Act of 1993. See, 47 U.S.C. §1, *et seq.* Nextel's claim of entitlement is incorrect as the language of the applicable statutes and the legislative history behind the creation of the applicable statutes do not support Nextel's conclusion.

The Budget Act did not state that the Commission would be required to provide any reallocation of spectrum or exclusive grants of authority to create any regulatory parity. The language of the Budget Act at Section 6002(d)(3)(B) stated that the Commission shall provide such modification in its rules and policies as would provide technical parity between entities which "become a commercial mobile service." The obvious intent of the language was to be fully prospective to

that time when the differences between radio services become blurred by the new distinctions afforded traditionally private radio facilities following attainment of CMRS operator status.² The Commission may note that, to date, Nextel has not achieved such status and its ability ever to attain such status is in doubt. It is apparent, therefore, that Nextel's requests within its proposals which rely on its status as a CMRS operator are wholly premature.

A continued legal analysis of Nextel's comments further demonstrates that lack of urgency or compulsion suggested in Nextel's comments. In accord with the language of the Budget Act at Section 6002(d)(3)(B), Congress directed the Commission to make such revisions in its regulations "as may be necessary and practical to assure that licensees in [of CMRS stations in the Private Radio Service] are subjected to the technical requirements that apply to licensees that are providers of substantially similar common carrier services." A careful reading of this language demonstrates clearly that the Commission need do nothing to accommodate Nextel, now or ever. The following would need to be shown by Nextel and affirmed by the Commission to justify enactment of Nextel's request: (1) that the proposal is necessary; (2) that the proposal is practical; (3) that the requested changes in the regulation involve parity as to technical requirements; and (4) that Nextel provides a

² In accord with the Budget Act, the date upon which any consideration of regulatory parity between traditionally Private Radio operations and Common Carrier operations is to be August 10, 1996. see, Section 6002(c)(2)(B). Nextel, with its request, is at least two years ahead of schedule.

substantially similar service as compared to the common carriers with which it seeks parity. Nextel has failed to demonstrate that it meets any of these criteria necessary for consideration.

In regard to point (1) above, Nextel has not demonstrated that adoption of its proposals is necessary. Triangle assumes that by "necessary," the statutory language meant necessary to serve the public interest. It may well be true that adoption is necessary for Nextel's business or operational strategy, but Nextel's machinations and preferences cannot be applied generally to the entire industry or the public. Triangle, therefore, submits that Nextel has not shown that its proposal is necessary to serve the public interest.

In regard to point (2) above, Nextel has certainly not shown that adoption of its proposal is practical. The chaos which will arise out of reallocating SMR spectrum across the United States, including the licensing morass, the intermodulation problems, and the extreme burden on end users is full evidence of the impracticality of Nextel's suggestions. Accordingly, Nextel has failed to demonstrate the second criteria for grant of its proposal.

Point (3) above provides the focus of the Commission's discretion to assist former Private Radio Service operators, by allowing the Commission to alter technical requirements to create operational parity between systems within different

Radio Services. Nextel's proposals go far beyond modifications in technical requirements (e.g. application of height/power restrictions) and extend to creation of an entirely new Radio Service. Such action is not contemplated by the legislation and would be inappropriate. Nextel continues to act and serve the public as an SMR operator, albeit different than a typical analog SMR operator. However, the differences between analog SMR and digital ESMR are no greater than the differences between an operator of trunked facilities and an operator of conventional facilities. They do not arise to the position where the creation of a new Radio Service out of a massive spectrum reallocation is necessary or appropriate.

Finally, point (4) above requires a showing of substantial similarity between the former Private Radio Service and the Common Carrier Service. Nextel cannot demonstrate such similarities. The overwhelming majority of its customer base are subscribers of dispatch services, which services Cellular operators are precluded from providing. Nextel's operation on the radio spectrum is one of provision of SMR services for all intents and purposes. In fact, absent the authority Nextel is seeking, there is no method whereby Nextel's services will ever be deemed to be substantially similar to Cellular providers. Therefore, it is apparent that Nextel is attempting to bootstrap its identity. Nextel wishes for the Commission to base Nextel's identity on what it might become, not what Nextel is. The statutory language does not support this method of demanding regulatory parity to adjust technical requirements within the Commission's Rules.

Additional legal problems exist for Nextel which are not contemplated within its comments, including the possible violation of Ashbacker rights which its plan appears to ignore.³ There are many applicants and many applications before the Commission, seeking additional SMR spectrum, including the spectrum which Nextel would deny those applicants. By reducing the amount of spectrum which might be employed by the Commission in granting those applications, Nextel's plan necessarily diminishes the rights of those applicants. This diminution of applicants' rights is violative of the applicants' rights which Ashbacker sought to protect.⁴

Nor has Nextel considered within its comments the effect of the newest amendments to the Communications Act which would dictate that Nextel's proposal could not be achieved without the need to hold auctions. It appears that Nextel's proposal involves a new reallocation for which mutually exclusive

³ Triangle is certain that the Commission is aware of the court's decision in Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327 (1945), wherein the court stated that the Commission could not adversely affect the rights of one applicant versus another when both had filed for operation on spectrum to be granted for exclusive operation. Prior to any entertainment of Nextel's radical proposal, the Commission must first determine whether any applicant might be so adversely affected and whether the Commission can fulfill its obligations under Ashbacker while meeting Nextel's proposed changes. Triangle strongly doubts that the Commission will be able to successfully dodge the constraints of Ashbacker if it chooses to favor Nextel's position. The effects of Ashbacker call into severe question whether Nextel's proposal might be legally permissible.

⁴ One element of Ashbacker is the existence of mutual exclusivity as between applicants for the subject spectrum. Given the proliferation of waiting lists and the effect that adoption of Nextel's proposal would create, the Commission may logically assume that all elements necessary to create a potential problem exist.

applicants would be created. Ergo, in accord with 47 U.S.C. §309(j), the spectrum would subject to auction. Triangle respectfully suggests that Congress did not intend for the Commission to employ its auction authority in this manner. In fact, Triangle is not fully convinced that Nextel would embrace such procedures for obtaining its stated objectives.⁵

For the above stated reasons, it is apparent that Nextel does not possess the legal foundation to make its requests. Triangle, therefore, respectfully requests that Nextel's comments and proposals be summarily rejected by the Commission.

Nextel Lacks An Equitable Foundation

In accord with the law of equity, Nextel's request would need to have shown that the public interest would suffer some irreparable harm arising out of the Commission's refusal to act in accord with Nextel's suggestions; or that the public interest would be better served by adoption; or that the public would not be harmed and the provision of services to the public would be benefitted by Nextel's proposals. The absence of these possible equitable bases from Nextel's proposals demonstrates that Nextel's proposals are as lacking in equitable basis as in legal basis.

⁵ Triangle notes that the Commission's auction authority requires that such auctions provide some method of participation by small businesses. It appears contradictory to devise the basis for an unneeded auction, when through its creation, it would place an unreasonable burden on small businesses, which are intended to be beneficiaries of such authority.

By any relevant test, it is apparent that the public would not be served by adoption of Nextel's proposals. The public would suffer the reduction of competition by the harm to be exacted against analog SMR operators. The public, as it is represented by SMR end users, would be forced to participate in a costly frequency exchange, including lost time which would have otherwise been devoted to end user businesses. The public would also be harmed by and through the Commission's need to devote a substantial amount of its extremely limited resources to participate in the re-licensing of hundreds of facilities. In sum, it is apparent that the public would not be served and, in fact, will be unduly taxed by adoption of Nextel's proposals.

From the other necessary perspective, the public would not be served by grant of Nextel's proposals. Nextel offers no telecommunications services which do not presently exist or which have not been prepared for introduction via the advent of digital Cellular operations and Personal Communications Services. Accordingly, Nextel is not positioned to make claims that, absent adoption of its proposals, the public will be deprived.

Accordingly, it is apparent that Nextel can make no case for itself arising out of equitable theories which might tend to favor adoption of its proposals. Triangle respectfully submits that the burden for demonstrating that the proposed action will

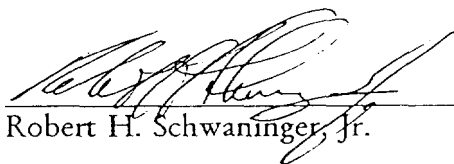
serve the public interest is squarely on Nextel and that Nextel has utterly failed to meet that burden.

Conclusion

For the reasons stated herein, the Commission should reject Nextel's proposals summarily as failing to provide either a legal or equitable foundation for adoption.

Respectfully submitted,
TRIANGLE COMMUNICATIONS, INC.

By



Robert H. Schwaninger, Jr.

Brown and Schwaninger
Suite 650
1835 K Street, N.W.
Washington, D.C. 20006
202/223-8837

Dated: July 11, 1994

CERTIFICATE OF SERVICE

I, Nakia M. Marks, hereby certify that on this 11th day of July, 1994, I caused a copy of the attached Reply Comments to be served by hand delivery or first-class mail, postage prepaid to the following:

Chairman Reed E. Hundt
Federal Communications Commission
Room 814
1919 M Street, NW
Washington, D.C. 20554

Karen Brinkmann
Federal Communications Commission
Room 814
1919 M Street, NW
Washington, D.C. 20554

Commissioner H. Quello
Federal Communications Commission
Room 802
1919 M Street, NW
Washington, D.C. 20554

Rudolfo M. Baca
Federal Communications Commission
Room 802
1919 M Street, NW
Washington, D.C. 20554

Commissioner Andrew C. Barrett
Federal Communications Commission
Room 826
1919 M Street, NW
Washington, D.C. 20554

Byron Marchant
Federal Communications Commission
Room 826
1919 M Street, NW
Washington, D.C. 20554

Commissioner Susan P. Ness
Federal Communications Commission
Room 832
1919 M Street, NW
Washington, D.C. 20554

Jan Mago
Federal Communications Commission
Room 844
1919 M Street, NW
Washington, D.C. 20554

Commissioner Rachalle B. Chong
Federal Communications Commission
Room 844
1919 M Street, NW
Washington, D.C. 20554

Rosalind K. Allen
Federal Communications Commission
Room 832
1919 M Street, NW
Washington, D.C. 20554

Blair Levin
Federal Communications Commission
Room 814
1919 M Street, NW
Washington, D.C. 20554

Ralph A. Haller
Chief, Private Radio Bureau
Room 5002
Federal Communications Commission
2025 M Street, NW
Washington, D.C. 20554

Beverly G. Baker
Private Radio Bureau
Federal Communications Commission
Room 5002
2025 M Street, NW
Washington, D.C. 20554

David Furth
Private Radio Bureau
Federal Communications Commission
Room 5202
2025 M Street, NW
Washington, D.C. 20554

Ron Netro
Private Radio Bureau
Federal Communications Commission
Room 5002
2025 M Street, NW
Washington, D.C. 20554

A. Richard Metzger, Jr.
Acting Chief
Common Carrier Bureau
Federal Communications Commission
Room 500
1919 M Street, NW
Washington, D.C. 20554

Gerald Vaughn
Common Carrier Bureau
Federal Communications Commission
Room 500
1919 M Street, NW
Washington, D.C. 20554

John Cimko
Mobile Service Division
Federal Communications Commission
Room 644
1919 M Street, NW
Washington, D.C. 20554

Terry Fishel
Chief, Land Mobile Branch
Licensing Division
Federal Communications Commission
1270 Fairfield Road
Gettysburg, Pennsylvania 17325

Alan R. Shark
President
American Mobile Telecommunications
Association
1150 - 18th Street, NW, Suite 250
Washington, D.C. 20036

Elizabeth Sachs
Lukas, McGowan, Nace &
Gutierrez
Suite 700
1819 H Street, NW
Washington, D.C. 20006

Mary Broomer
Mike Kennedy
Joe Vestel
Motorola, Inc.
Suite 400
1350 Eye Street, NW
Washington, D.C. 20005

Mark Crosby
ITA, Inc.
Suite 500
1110 N. Glebe Road
Arlington, Virginia 22201

Alan Tilles
Meyer, Faller, Weisman &
Rosenberg
Suite 380
4400 Jennifer Street, NW
Washington, D.C. 20015

Leslie A. Taylor
Leslie Taylor Associates
6800 Carlynn Court
Bethesda, MD 20817

Robert S. Foosaner, VP
Nextel Communication, Inc.
800 Connecticut Avenue, NW
Suite 1001
Washington, DC 20006

Norman P. Leventhal
Raul R. Rodriguez
Levental, Senter & Lerman
2000 K Street, NW
Suite 600
Washington, DC 20006

Gail L. Polivy
1850 M Street, NW
Suite 1200
Washington, DC 20036

Susan H-R. Jones
Gardner, Carton & Douglas
1301 K Street, NW
Suite 900 East Tower
Washington, DC 20005

Cathlen A. Massey
McCaw Cellular, Inc.
1150 Connecticut Avenue, NW
4th Floor
Washington, DC 20036

William J. Franklin, Chartered
1919 Pennsylvania Avenue, NW
Suite 300
Washington, DC 20006

Frederick M. Joyce
Christine McLaughlin
Joyce & Jacobs
2300 M Street, NW
Suite 130
Washington, DC 20037

Fredrick J. Day
1110 N Glebe Road
Suite 500
Arlington, VA 22201

Thomas J. Caey
Jay L. Birnbaum
Timothy R. Robinson
Skaddon, Arps, Slate, Meagher & Flom
1440 New York Avenue, NW
Washington, DC 20006

Wayne Black
Dorothy E. Cukier
Keller & Heckman
1001 G Street, NW
Suite 500 West
Washington DC 20001

Jay C. Keithley
Leon Kestenbaum
Sprint Corp.
1850 Street, NW
Suite 1100
Washington, DC 20036

Kevin Gallaher
8725 Higgins Road
Chicago, IL 60631

Craig T. Smith
P.O. Box 11315
Kansas City, MO 64112

Harold C. Davis
Smartlink Development LP
1269 S. Broad Street
Willingford, Connecticut 06492

W. Bruce Hanks, President
Century Cellunet, Inc.
100 Century Park Avenue
Monroe, LA 71203

Henry Goldberg
Jonathan L. Wiener
Daniel S. Goldberg
Goldberg, Godles, Wiener & Wright
1229 19th Street, NW
Washington, DC 20036

J. Barclay Jones, VP
American Personal Communication
1025 Connecticut Avenue, NW
Washington, DC 20036

Mark J. O'Conner
Mark J. Tanber
Piper & Marbury
1200 19th Street, NW
7th Floor
Washington, DC 20036

Jim O. Elewelllyn
William B. Barfield
1155 Peachtree Street, NE
Atlanta, Georgia 30309-3610

Charles P. Featherstun
David G. Richards
1133 21st Street, NW
Washington, DC 20036

Robert A. Mazer
Nixon, Hargrave, Devans & Doyle
One Thomas Circle, NW
Suite 800
Washington, DC 20005

William R. Miller
Russ Miller Rental
3620 Byers Avenue
Fort Worth, TX 76107

Michael Hirsch,
VP External Affairs
Geotek Communications
1200 19th Street, NW #607
Washington, DC 20036

Robin G. Nietert
Scott C. Cinnarion
Brown, Nietert & Kaufman, Chartered
1920 N Street, NW
Suite 660
Washington, DC 20036

Raymond G. Bender, Jr.
J.G. Harrington
Leonard J. Kennedy
Laura H. Phillips
Richard S. Dennins
Dow, Lohnes & Albertson
1255 23rd Street, NW
Suite 500
Washington, DC 20037

Gerald S. McGowan
George L. Lyon, Jr.
Thomas Gutierrez
David A. LaFuria
Lukas, McGowan, Nace & Gutierrez,
Chartered
1819 H Street, NW
7th Floor
Washington, DC 20006

Stephen G. Kraskin
Cardessa D. Bennet
Karskin & Associates
2120 L Street, NW
Suite 810
Washington, DC 20037

Michael Carper
General Counsel
OneComm
Suite 500
4643 S. Ulster Street
Denver, Colorado 80237

Bill Dekay
Dial Page
Suite 700
301 College Street
Greenville, South Carolina 29603-0767

Russell H. Fox
Gardner, Carton & Douglas
Suite 900, East Tower
1301 K Street, NW
Washington, D.C. 20005

Willard K. Shaw
Mobile Radio Communications
2226 Vista Valley Lane
Vista, California 92084

Carole C. Harris Christine M. Gill
Tamara Y. Davis Keller & Heckman
1001 G Street, NW
Suite 500 West
Washington, DC 20001

David C. Jatlow
Young & Jatlow
2300 N Street, NW
Washington, DC 20037

Donald M. Mukai
Jeffrey S. Bork
U.S. West, Inc.
1020 19th Street, NW
Suite 700
Washington, DC 20036

Paul J. Feldman
Fletcher, Heald & Heldreth
11th Floor
1300 North 17th Street
Rosslyn, Virginia 22209

Jeffery L. Sheldon
Sean A. Stokes
1140 Connecticut Avenue, NW
Suite 1140
Washington, DC 20036

Brian Kidney
Pamela Riley
425 Market Street
San Francisco, California 94108

Kenneth G. Starling
Sutherland, Asbill & Brennan
1275 Pennsylvania Avenue, NW
Washington, DC 20004

David A. Gross
Kathleen D. Abernathy
1818 N Street, NW
Washington, DC 20036

John T. Scott, III
Charon J. Harris
William D. Wallace
Crowell & Moring
1001 Pennsylvania Avenue, NW
Washington, DC 20004

Philip L. Spector
Susan E. Ryan
Paul, Weiss, Rifkind, Wharton & Garrison
1615 L Street, NW
Washington, DC 20554

William J. Balcerski
Edward R. Wholi
120 Bloomingdale Road
White Plains, New York 10605

Richard Rubin
Fleishmann & Walsh
1400 16th Street, NW
Suite 600
Washington, DC 20036

Elliot J. Greenwald
Howard C. Griboff
Fisher, Wayland, Cooper, Leader, &
Zaraguza, L.L.P
2001 Pennsylvania Avenue NW Suite 400
Washington, DC 20006

Lon C. Levin, VP
American Mobile Satellite Corp.
10802 Parkridge Boulevard
Reston, VA 22091

Andrea S. Miano
Reed, Smith, Swaw & McClay
1200 18th Street, NW
Washington, DC 20036

Thomas J. Keller
Verner, Liipthert, Bernhard, McPherson &
Hand, Chartered
901 15th Street, NW
Suite 700
Washington, DC 20005

Robert Fay
Police Emergency Radio Service, Inc.
82 Herbert Street
Franinham, MA 01701

Alan C. Campbell, Pres.
FCBA
1722 Eye Street, NW
Suite 300
Washington, DC 20006

Donald J. Elardo
Larry A. Blooser
Gregory F. Intoccia
1801 Pennsylvania Avenue, NW
Washington DC 20006

Frank Michael Panek
2000 W Ameritech Center Drive
Hoffman Estates, IL 60196-1025

James Bradford Ramsay
102 Commerce Commission Building
Constitution Avenue, & 12th St., NW
Washington, DC 20423

Daryl L. Avery
DC Public Service Commission
450 5th Street, NW
Washington, DC 20001

David A. Reams, Pres.
Grand Broadcasting
P.O. Box 502
Perryburg, OH 43552

Anne P. Jones
Sutherland, Asbill & Brennan
1275 Pennsylvania Avenue, NW
Washington, DC

Edward R. Wholl
120 Bloomingdale Road
White Plains, NY 10605

Albert H. Kramer
Robert F. Aldrich
David B. Jeppsen
Keck, Mahin & Cate
1201 New York Avenue, NW
Washington, DC 20005-3919

David Cosson
2626 Pennsylvania Avenue, NW
Washington, DC 20037

Martin T. McCul, VP
900 19th Street, NW
Suite 800
Washington, DC 20006

Michael J. Shortley, III
180 South Clinton Avenue
Rochester, NY 14646

Jan M. Reed
Route 5, Box 180-W
Crossville, TN 38555

Terrence P. McGarty
Telmar Telecommunication
265 Franklin Street
Suite 1102
Boston, Massachusetts 02110

Corporate Technology Partners
100 S. Ellsworth Avenue, 9th Floor
San Mateo, CA 94401

Rodney Joyce
Ginsburg, Feldman & Bress
1250 Connecticut Avenue, NW
Washington, DC 20036

Ellen S. Levine
CA Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Joel Levy
Cohn & Marks
1333 New Hampshire Avenue, NW
Washington, DC 20036

Thomas A. Strov
Mark Golden
Telocator
1019 19th Street, NW
Suite 1100
Washington, DC 20036

Richard M. Tettlebaum
Gurman, Kurtis, Blask & Freedman,
Chartered
1400 16th Street, NW
Suite 500
Washington, DC 20036

Carl Northrop
Bryan Cave
700 13th Street, NW
Suite 700
Washington, DC 20005

Koteen & Naftalin
1150 Connecticut Avenue
Washington, DC 20036

W. Bruce Hanks, Pres.
Century Cellunet, Inc.
100 Century Park Avenue
Monroe, LA 71203

Linda Sadler
Rockwell International Corp.
1745 Jefferson Davis Highway
Arlington, VA 22202

G.A. Gorman
North Pittsburgh Telephone Company
4008 Gibsonia Road
Gibsonia, PA 15044-9311

Penny Rubin
State of New York Department of Public
Service
Three Empire State Plaza
Albany, NY 12223

David Jones
Government and Industry Affairs
Committee
2120 L Street, NW Suite 810
Washington, DC 20037

Michael Hirsch
1200 19th Street, NW
Suite 607
Washington, DC 20036

David Hill
Audrey Rasmussen
O'Conner & Hannan
1919 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006-3483

John Lane
Robert Gurss
Wikes, Artis, Hedrick & Lane, Chartered
1666 K Street, NW
Washington, DC 20006

Robert B. Kelly
Douglas Povich
Kelly, Hunter, Mow & Povich, P.C.
1133 Connecticut Avenue, NW
Washington DC 20036

Corwin Moore, Jr.
Personal Radio Steering Group
P.O. Box 2851
Ann Arbor, Michigan 48106

Marjorie Esman
Hardy and Carey
111 Veterans Boulevard
Metairie, LA 70005

Shirley Fuji Moto
Brian Turner Ashby
Keller and Heckman
1001 G Street NW
Washington, DC 20001

Kathy Shobert
Director of Federal Regulatory Affairs
888 16th Street, NW Suite 600
Washington, DC 20006


Nakia Marks